MAY 13 1946
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1223

HOMER L. LOOMIS,

Petitioner,

against

UNITED STATES OF AMERICA,

and

LEO T. CROWLEY, Alien Property Custodian of the United States,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

HOMER L. LOOMIS,
Pro se,
60 Wall Street,
New York City, New York.

APPEAL PRINTING CO., INC., 129 CEDAR ST., NEW YORK, WO 2-2341

TABLE OF CONTENTS

PAGE

Petition for Writ of Certiorari 1

A. Summary Statement of Matter Involved..... 1–9

B. Jurisdictional Statement 9–10

C. The Questions Presented 10–12

D. Specifications of Error 12–23

E. Reasons Relied on for the Allowance of the Writ 23–28

Brief in Support of Petition:

A. Introductory Statements 31–32

1. Report of Opinions Below 31

2. Basis of Jurisdiction 32

3. Specifications of Error 32

B. Argument 32–71

Summary of Argument 32–37

First Point—The decree affirmed by the Circuit Court in denying Petitioner a defense of his equitable title in and to the Fund in the registry of the District Court denied him the due process to which he was entitled under the Constitution 37–52

a. Petitioner's claim stated a perfect cause of right to the fund and exercise of the District Court's jurisdiction 37–40

b. The lower Courts' refusal to permit Petitioner to defend in court his asserted property right when there assailed, constituted an arbitrary and capricious denial of due process 41–52

PAGE

SECOND POINT—The Circuit Court of Appeals erred in holding that it was without jurisdiction to hear Petitioner's appeal 52–71

a. The admiralty *in rem* jurisdiction of a United States District Court survives the loss of its *res* where the latter is removed improvidently or in violation of law 54–57

b. The equity jurisdiction of a United States District Court administering in admiralty a remnant and surplus survives its loss 57–60

c. Sovereign immunity presents no obstacle to the exercise of the jurisdiction of a United States Court, either admiralty *in rem* or equity, to which the sovereign has voluntarily submitted.... 60–67

d. The stay of a supersedeas was unnecessary to keep alive the District Court's jurisdiction..... 67–71

Conclusion—The petition for a writ of certiorari should be granted to the end that the proceedings had below may here be reviewed and the decree there entered reversed 72

Table of Cases

Adeline, The, 9 Cranch 248 ..... 37, 71
Ager v. *Murray,* 105 U. S. 126 ..... 58, 59
Albert Schultz, The, 12 Fed. 156 ..... 33, 40
Andrews v. *Wall,* 3 How. 568 ..... 33, 40
Athol, The, 1 Wm. Rob. 374 65
Atlantic City, The, 220 Fed. 281 40
Ayers, In re, 123 U. S. 123 66

Barnes v. *Alexander,* 232 U. S. 117 ..... 32, 39
Brennero, The, (C.C.A.), 153 F. 2d 138 ..... 6, 31
(D.C.) 58 F. Supp. ~~927~~ 447 ..... 6, 31
Brown v. *United States,* 8 Cranch 110 ..... 25, 51

PAGE

Chicot County v. *Sherwood*, 148 U. S. 529 49
City of Norwich, The, 118 U. S. 468 58
Cohens v. *Virginia*, 6 Wheat. 264 ..... 25, 49
Colonna, Ex parte, 314 U. S. 510 2
Columbian Government v. *Rothschild*, 1 Sim. 94 65
Corbett v. *Nutt*, 10 Wall. 464 58
Crow Dog, Ex parte, 109 U. S. 556 50

Duchese, The, Swabey 264 57
Du Pont de Nemours & Co. v. *Vance*, 19 How. 162 ..... 37, 71

Eclipse, The, 135 U. S. 599 40
Edith, The, 94 U. S. 518 ..... 33, 40

Finley v. *Lynn*, 6 Cranch 238 ..... 37, 71
Flora, The, Law Rep. 1 Adm. 45 57
Flying Fish, The, 2 Cranch 170 66

Gazelle and Cargo, The, 184 U. S. 474 ..... 37, 71
Goldthwaite v. *Day*, 149 Mass. 185 65
Graham & Foster v. *Goodsell*, 282 U. S. 409 50
Guiding Star, The, 18 Fed. 263 ..... 33, 38, 57

Hartford Accident Co. v. *Southern Pacific*, 273 U. S. 207 ..... 25, 38, 40, 58
Heckers v. *Fowler*, 2 Wall. 123 68
Hero, The, Brown & Lush. 447 57
His Majesty's Government, etc., v. *Compagnie, G. T.*, 40 F. Supp. 650 40
Hovey v. *Elliott*, 167 U. S. 409 ..... 14, 15, 25, 32, 34, 36, 41
Hunter v. *Central Union Trust Co.*, 17 F. 2d 174 ..... 14, 34, 50
Hurtado v. *California*, 110 U. S. 516 41

I. F. Chapman, The, 241 Fed. 836 ..... 23, 36, 57
Ingersoll v. *Coram*, 211 U. S. 335 ..... 13, 32, 39
Irrigation Company v. *Gildersleeve*, 174 U. S. 603 ..... 25, 68
Isenberg v. *Trent Trust Co.*, 26 F. 2d 609, cert. den. 279 U. S. 862 ..... 15, 16, 25, 34, 44, 45, 46, 50

J. E. Rumbell, The, 148 U. S. 1 ..... 13, 33, 40
John Jay, The, 17 How. 399 40
Just v. *Chambers*, 312 U. S. 383 ..... 25, 38

PAGE

Ketchum v. *St. Louis,* 101 U. S. 306 ..... 32, 39

Legard v. *Hodges,* 1 Ves. Jr. 478 39
Lewis v. *Darling,* 16 How. 1 58
Liverpool Steam Co. v. *Phenix Ins. Co.,* 129 U. S. 397 ..... 37, 71
Livingston v. *The Jewess,* 1 Ben. 19n., 15 Fed. Cas. 665, Case No. 8412 57
Lottawanna, The, 20 Wall. 201 ..... 32, 33, 37, 38, 40, 57, 59

Massie v. *Watts,* 6 Cranch 148 ..... 25, 58
McClellan v. *Carland,* 217 U. S. 268 49
McVeigh v. *United States,* 11 Wall. 259 ..... 14, 15, 25, 32, 34, 36, 41
Mechanics Bank v. *Seton,* 1 Pet. 299 59
Miller v. *Sherry,* 2 Wall. 249 59
Miller v. *United States,* 11 Wall. 268 51
Mitchell v. *Bunch,* 2 Paige (N. Y.) 606 59
Morf v. *Bingaman,* 298 U. S. 407 50
Muller v. *Dows,* 94 U. S. 444 58

Newbattle, The, 10 P. D. 33 66
Nuestra Señora de Regla, The, 108 U. S. 92 ..... 19, 25, 36, 37, 55, 56, 63, 64, 65, 66

Oliver v. *Piatt,* 3 How. 333 ..... 25, 59
Osborn v. *United States Bank* 16, 25, 66

Paquete Habana, The, 198 U. S. 453 66
Patten v. *Wilson,* 34 Pa. 299, 300 39
Penn v. *Lord Baltimore,* 1 Ves. 444 59
Pennell v. *Deffell,* 4 De Gex, M. & G. 372 59
Perry v. *United States,* 294 U. S. 330 25
Phebe, The, 1 Ware [354] 360, 19 Fed. Cas. 424, Case No. 11,065 ..... 41, 42
Phelps v. *McDonald,* 99 U. S. 298 ..... 25, 58
Philadelphia Co. v. *Stimson,* 223 U. S. 605 ..... 25, 66
Providence Steamship Co. v. *Hill Manufacturing Co.,* 109 U. S. 578 ..... 40, 58

Rio Grande, The, 23 Wall. 458 ..... 16, 18, 25, 36, 54, 70
Rodgers v. *United States,* 185 U. S. 83 50

PAGE

Schuchardt v. *Ship Angelique*, 19 How. 239 .....13, 33, 40, 41
Second Employers' Liability Cases, 223 U. S. 1 49
Siren, The, 7 Wall. 152 .....19, 25, 36, 61, 62, 63, 64, 65
St. Lawrence, The, 66 U. S. 522 49
Stoehr v. *Wallace*, 255 U. S. 239 .....14, 25, 34, 50, 51
Suydam v. *Broadnax*, 14 Pet. 67 49

Terney v. *Wilson*, 45 N. J. L. 282 39
Tervaete, The, [1922] P. 259 66
Thekla, The, 266 U. S. 328 .....19, 25, 37, 65
Three Friends, The, 166 U. S. 1 .....23, 25, 36, 56, 57, 71
Truax v. *Corrigan*, 257 U. S. 312 .....14, 15, 25, 32, 34, 36, 41, 42

Union, The, 4 Blatchf. 90 57
Union Bank v. *Jolly's Administrators*, 18 How. 503 49
Union Pacific Railway Co. v. *McAlpine*, 129 U. S. 305.... 59
United States v. *Ames*, 99 U. S. 35 .....22, 25, 36, 57, 71
United States v. *Dunn*, 268 U. S. 121 .....25, 59, 60
United States v. *422 Casks of Wine*, 1 Pet. 547 32
United States v. *Lee*, 106 U. S. 196 66
United States v. *Mackoy*, 2 Dill. 299, 26 Fed. Cas. 1,123, Case No. 15,696 57

Virgo, The, 13 Blatchf. 255 57

Walker v. *Brown*, 165 U. S. 654 .....13, 32, 39
Washington v. *Miller*, 235 U. S. 422 50
Watts, Watts & Co. v. *Unione Austriaca di Navigazione*, 248 U. S. 9 .....14, 15
Weil v. *Neary*, 278 U. S. 160 .....18, 25, 36, 68
Western Maid, The, 257 U. S. 419 65
Williams v. *Ingersoll*, 89 N. Y. 508 39
Wilson v. *Seeber*, 72 N. J. Eq. 523 39
Windsor v. *McVeigh*, 93 U. S. 274 .....14, 15, 25, 32, 34, 36, 41

Young, Ex parte, 209 U. S. 123 66

Table of Laws

PAGE

Constitutional:
Fifth Amendment 13, 16, 17, 24, 32, 34, 36, 41

Congressional:
Statutes:
Idle Foreign Vessels Act, June 6, 1941 (55 Stat. 242; 50 U. S. C. A., App., sec. 1271) 11

Judicial Code, sec. 240 (Act of March 27, 1911, c. 23, sec. 240, 36 Stat. 1157, as amended by the Act of Feb. 13, 1925, c. 229, sec. 1 [43 Stat. 938], 28 U. S. C. A., sec. 347) 9–10

Revised:
Sec. 918 (28 U. S. C. A., sec. 731) 67, 68

1007, as amended by the Act of Feb. 18, 1925, c. 80, sec. 1, 18 Stat. 318 (28 U. S. C. A., sec. 874) 7, 17, 21, 27, 35, 36, 54, 67, 68

1012, as affected by the Act of Mar. 3, 1911, c. 231, sec. 291, 36 Stat. 1167 (28 U. S. C. A., sec. 880) 7, 17, 21, 27, 35, 36, 54, 67, 68

Trading with the Enemy Act, Oct. 6, 1917, c. 106 (40 Stat. 411; 50 U. S. C. A., App.) 6, 11, 51

Sec. 5(b) 14
7(a) 26
7(c) 6, 14, 33
7(d) 16, 17, 26, 34, 48, 49
7(e) 17, 34, 48, 49
9(a) 6, 33, 43

Executive:
Alien Property Custodian's Vesting, No. 52 (7 F. R. 5738) 3, 4, 43, 44, 45, 46, 47

Executive (No. 9095) 7 F. R. 1971, as amended by Exec. (No. 9193) 7 F. R. 5205 14
Sec. 2(f) 51
10(a) 14

PAGE

Executive (No. 9193) 7 F. R. 5205 ..... 14, 51

Judicial:

U. S. Adm. Rules:

41 ..... 7, 67

42 ..... 2, 32, 38

44 68

U. S. Dist. Ct. (D. N. J.) Adm. Rule 28 ..... 8, 17, 21, 35, 36, 67, 68

Table of Commentaries

Pomeroy's Equity Jurisprudence [5th ed., 1941], Vol. 4, sec. 1235, p. 696 ..... 13, 39

Story's Equity Jurisprudence, Vol. II,

Sec. 899 58

Sec. 1231, pp. 316-317 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

HOMER L. LOOMIS,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY,
Alien Property Custodian of the United States,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

The petition of Homer L. Loomis respectfully alleges and propounds as follows:

A

Summary Statement of Matter Involved

1

Your petitioner is a citizen of the United States, a resident of the State and City of New York, and a mem-

ber of the bar of this Honorable Court and each of the lower courts.

2

When the Italian vessel "Brennero" came into the custody of the United States District Court for the District of New Jersey in the admiralty proceedings that constitute in part the subject matter of the Petition filed in No. 1176, October Term, 1945, she had aboard a cargo of lubricating oil, to which a claim was filed by Don Ascanio Colonna, Italian Ambassador to the United States, asserting such oil to be then owned by the Italian Government and claiming it as such (R. 19a).* By the Court's order (R. 17a), made at the instance and on the motion of the United States (13a-18a), that oil was subsequently sold (R. 3a), producing net proceeds of $151,599.45, which were ordered and were paid into the registry of the Court (R. 44a).

3

In connection with that disposition of the cargo, there had been much litigation in which your petitioner had performed substantial legal services for said claimant of said cargo, and on May 11, 1942, those particular services having been concluded in the meantime (*Ex parte Colonna*, 314 U. S. 510), your petitioner, pursuant to Rule 42 of the Admiralty Rules of this Court,† filed in the District Court a petition alleging, among other things (35a), that

> "by agreement between him and the owner of said cargo, it was stipulated that his services and dis-

* This and similar notations refer to pages of the printed transcript of record filed herein.

† This rule, as pertinent, reads:

> "Any person having an interest in any proceeds in the registry of the court shall have a right by petition and summary proceedings to intervene *pro interesse suo* for delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice * * *"

bursements should be chargeable 'as a lien' thereon, and should be recoverable therefrom'';

describing the nature and extent of those services and praying for an order fixing the just value thereof and directing payment of the same and of the said disbursements to your petitioner out of said fund as property charged therewith.

And on March 24, 1943, his petition not having been acted on in the meantime, and extensive legal services by your petitioner in respect to the vessels forming the subject matter of the petitions in Cases Nos. 1172 to 1179 respectively (Oct. T. '45), having in the meantime been completed either in whole or in measurable part, a further petition of the same nature was filed on March 24, 1943, seeking enforcement of said lien against said fund for such other professional services, alleging them also to be within the protection of said lien, describing their nature and extent, and claiming that their just value exceeded the total amount of said fund (R. 81a), and praying, therefore, the entry of an order fixing the value of said services and directing the payment to your petitioner of the whole of said fund on account of said services and the disbursements by him incurred in connection therewith (R. 81a). These petitions are hereinafter referred to as petitioner's claim or petition.

4

In the meantime, to-wit, on July 22, 1942, (R. 54a), respondent Leo T. Crowley, the then Alien Property Custodian, by Vesting Order No. 52 (R. 52a), purported to capture for enemy ownership *not* the *fund itself*, but the *interest therein, if any*, of Societa Anonima Cooperativa di Navigazione Garibaldi, the Italian Government and the Italian Navy (52a, 53a, 54a, 57a). And on March 17,

1943, (R. 47a), said Custodian filed in said Court his petition praying for an order directing payment to him of the said fund, on the ground that other than the proctors for the cargo, no person had made any claim to the fund (R. 49a) and that the claim of proctors was unsustainable because their services had not "in any manner *benefited* the *res*" (R. 49a), that they were at best, therefore, but general "creditors of the Royal Italian Government *whose* title he" (the Custodian) "has acquired by such Vesting Order" (R. 50a) and that they, therefore, "should be remitted to administrative proceedings before" the Custodian (R. 50a).

5

On March 29, 1943, (R. 82a), the Royal Italian Government, as owner of said cargo, and Societa Anonima Cooperativa di Navigazione Garibaldi, as bailee thereof, filed their answer to the Alien Property Custodian's petition, denying *inter alia* the right of the Alien Property Custodian to the proceeds resulting from the said sale of said cargo (R. 50a, 83a) and affirmatively alleging and propounding that

> "not only does the petition fail to establish in the Alien Property Custodian any right to the possession or control of the said deposit, but by the express provisions of the law and Executive Orders made pursuant thereto, the Alien Property Custodian is prohibited from acquiring custody and possession of the said deposit, or exercising control thereover" (R. 83a);

and praying the entry of an order dismissing the Custodian's said petition.

Also on March 29, 1943, (R. 85a), your petitioner filed an answer to the Custodian's said petition, in which

answer your petitioner *inter alia* repeated in substance the said allegations of his said petition, denied the right of the Alien Property Custodian to possession or control of the said proceeds, asserted that he was, on the contrary, by the express provisions of the law prohibited from acquiring the same, and prayed the entry of an order denying and dismissing the Custodian's said petition and directing that said fund

> "be retained in the possession and custody and control of this" (the District) "Court to satisfy the claims of the said intervening petitions for the payment of counsel fees and the reimbursement of legal expenses, as aforesaid" (R. 87a).

6

On March 29, 1943 (R. 6a), the Custodian's said petition came on for hearing in said District Court before Hon. William F. Smith, District Judge, but without the production of any proof in support thereof and without any opportunity's being accorded the parties answering it as aforesaid to make good their defense thereto with proof or otherwise, and was orally argued with provision made for the filing of briefs. Decision was reserved. Your petitioner's claim though duly noticed for hearing at the same time (R. 65a) was left unheard (R. 6a, 94a).

7

On January 19, 1944, (R. 90a), the said Court filed its opinion, granting, without a trial, the prayer of the Custodian for possession of the fund—but on grounds by him never voiced and inconsistent with those he had asserted—and dismissing, without a trial, the claim of your petitioner (R. 93a). The basis of the Court's opinion was (R. 93a) that

> "The Custodian, upon seizure of *the proceeds of the cargo,* acquired absolute title to *the fund* on deposit in the registry of the court * * * and a right to *its* immediate possession" (Emphasis added);

that the court was, therefore, "without jurisdiction to entertain" your petitioner's demands; that they were "in substance suits against the United States"; that they might, therefore, be maintained "only with the consent of the sovereign"; and that such consent had not been given to the making of such demands against it in court save in the method "provided by Section 9(a) of the Trading with the Enemy Act" (Act of October 6, 1917, c. 106, sec. 9[a]; 40 Stat. 411; 50 U. S. C. A., App., sec. 9[a]) and made exclusive by sec. 7(c) of the same Act* (R. 93a).

---

* Section 7(c), as pertinent, provides:

> "If the President shall so require any money or other property * * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy * * * not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, * * * may be seized by the Alien Property Custodian; * * *
>
> * * * * * *
>
> "The sole relief and remedy of any person having any claim to any money or property * * * seized by him shall be that provided by the terms of this Act."

Section 9(a), as pertinent, reads:

> "Any person not an enemy or ally of enemy claiming any interest, right, or title, in any * * * property * * * seized by him" (the Alien Property Custodian) "hereunder and held by him * * * or to whom any debt may be owing from an enemy * * * whose property or any part thereof shall have been * * * seized by him hereunder * * * may file with the said custodian a notice of his claim * * * and * * * may institute a suit in equity in the Supreme Court of the District of Columbia or in the District Court of the United States for the district in which such claimant resides * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, * * * or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled."

8

On January 20, 1944 (R. 94a), the District Court entered on said opinion its decree which, though not adjudicating expressly with respect to your petitioner's claim, did, in effect, deny or dismiss it, by directing the Clerk to pay over to the Custodian "the proceeds of the sale of said cargo" (R. 94a).

9

On Monday, January 24, 1944 (R. 7a), that is, three days after the filing of said decree, Sunday excluded, the Judge and Clerk of the District Court executed the said order by forwarding the said proceeds* of sale to the Custodian; although by R. S. sec. 1007, as amended by the Act of February 18, 1925, c. 80, sec. 1, 18 Stat. 318, (28 U. S. C. A., sec. 874),† and R. S. sec. 1012, as affected by the Act of March 3, 1911, c. 231, sec. 291, 36 Stat. 1167, (28 U. S. C. A., sec. 880)‡ it was *unlawful to execute the decree until ten days, Sundays excluded, after its entry—*

---

* They were paid by a check which under Rule 41 of the Admiralty Rules of the United States had to be signed by the Judge and countersigned by the Clerk. That Rule reads:

"All moneys paid into the registry of the Court shall be deposited in some bank designated by the Court, and shall be so deposited in the name of the Court, and shall not be drawn out, except by a check or checks *signed by a judge of the Court* and countersigned by the Clerk, stating in whose account and for whose use it is drawn, and in what suit and out of what fund it is paid. The Clerk shall keep a regular book, containing a memorandum and copy of all of the checks so drawn and the date thereof." (Emphasis added.)

† R. S. §1007, as amended by the Act of Feb. 18, 1875, c. 80, §1, 18 Stat. 318, (28 U. S. C. A. §874), and as pertinent, reads as follows:

"In any case where a writ of error may be a supersedeas, * * * Sundays exclusive, * * * executions shall not issue until the expiration of ten days."

‡ R. S. §1012, as affected by the Act of March 3, 1911, c. 231, §291, 36 Stat. 1167, (28 U. S. C. A., sec. 880), and as pertinent, reads:

"Appeals from district courts shall be subject to the same rules, regulations, and restrictions as * * * prescribed in law in cases of writs of error."

that is, until Tuesday, February 1, 1944,—and by Rule 28 of the Admiralty Rules of said court,* a certified copy of which is here exhibited the execution of the decree was *automatically stayed* until a time *ten* days following *service upon petitioner of a copy of said decree with notice of filing.*

10

Neither does the record show, nor has it ever been claimed, nor is it the fact that any copy of said decree, with notice of filing, has ever to this day been served upon petitioner to start the running of the last ten days of the stay provided by said Rule 28 of the District Court's Admiralty Rules.

11

Pursuant to leave obtained on April 20, 1944 (R. 97a), your petitioner appealed to the Circuit Court of Appeals for the Third Circuit from the said decree and the rulings announced in said opinion whereon the decree was based,

---

* "United States of America, District of New Jersey.

"I, William H. Tallyn, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that Rule 28 of the Admiralty Rules of this Court, to wit:

> 'In appealable cases ten days from the time of service of a copy of the decree on the opposite proctor, with notice of its entry, shall be allowed to enter an appeal, within which time the decree shall not be executed. The security for damages and costs described in Rule 13 of the Circuit Court of Appeals shall be given within ten days after the filing of the notice of appeal, or execution may issue as of course to enforce the decree of this Court, unless otherwise ordered by the Court.'

was adopted by this Court on May 1, 1938.

"I further certify that there is no order of this Court on file directly repealing this Rule.

"IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of said Court, at Newark, in said District, this 25th day of March, A.D. nineteen hundred and forty-six.

William H. Tallyn, Clerk.
by Minnie M. Spalletta,
Deputy Clerk."

(Seal)

and assigned as error *inter alia* the Court's so delivering the *res* and failing to retain it in its possession as so required (102a).

12

On March 30, 1945, the appeal came on to be heard in the said Circuit Court of Appeals, which on December 13, 1945, filed its opinion of affirmance and on December 21, 1945, its order based thereon. The reasoning on which the Circuit Court reached that result was in substance that the Custodian had by virtue of his vesting order captured "title to the oil". But the Court also ruled that, despite such capture, petitioner was, if possessed of a valid lien, still entitled to assert the same against the fund in the District Court; that the decree of the District Court directing delivery of the fund to the Custodian was, however, "a lawful court order"; and that, since petitioner did not lodge his appeal and move for a stay before the fund was so delivered, the District Court had lost all jurisdiction further to hear his petition and the Circuit Court all jurisdiction to hear his appeal (R.).

On December 28, 1945, your petitioner filed his petition for a reargument of his appeal (R.), which, without opinion, was denied by order filed on February 13, 1946.

B

Jurisdictional Statement

1

The statutory provision sustaining the jurisdiction here invoked is section 240 of the Judicial Code as amended (Act of March 3, 1911, c. 23, sec. 240, 36 Stat. 1157, as

amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938; 28 U. S. C. A., sec. 347).*

2

The date of the decree sought to be reviewed is December 21, 1945 (R.), as to which a timely petition for reargument was denied by an order filed February 13, 1946 (R.); the date upon which this application for certiorari is presented is May /3 , 1946.

C

The Questions Presented

1

Whether an alien enemy whose cargo property has been brought into the custody and control of a United States District Court under admiralty process *in rem* issued against the carrying vessel at the instance of the Federal Government and has been sold by said court at the instance of that Government producing proceeds which are deposited in the registry of said court, and whose property in said proceeds has there been assailed by the Federal Government on the ground of having a captor's title thereto by reason of capture for enemy ownership, and who appears in said court and undertakes to defend the *res*, may by judicial decree be deprived thereof unheard and without a trial.

---

* Section 240 of the Judicial Code, as amended and pertinent, reads as follows:

> "In any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower Court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

2

Whether under the same circumstances described in Question 1, *supra,* an American citizen whose property in the said proceeds has been assailed by the Federal Government as wholly non-existent either prior to or at the time of the said alleged capture of said alien enemy's interest in said proceeds and who appears in said court and undertakes to defend his property in the *res,* may by judicial decree be deprived thereof unheard and without a trial.

3

Whether the said alien enemy's property in said cargo proceeds—in a case where the circumstances disclosed in Questions 1 and 2 *supra* are present and where the said vessel's use and possession, under the Idle Foreign Vessels Act, has been requisitioned, availed of and operated as chartered by the Federal Government and her said cargo's proceeds realized and deposited as aforesaid while the said vessel's and said cargo's owner is still an alien friend,—becomes, while the said proceeds are still so deposited in the Court's registry, and while the vessel is still so possessed and operated by the Federal Government, subject to capture under the Trading with the Enemy Act on that Government's going to war with that of the said vessel and said cargo owner.

4

Whether in the circumstances disclosed in Questions 1, 2 and 3 *supra,* a vesting order made by the Alien Property Custodian of the United States, wherein he purports to vest in himself such "right, title and interest, if any," as the said alien enemy may then have in said proceeds, but disclaims all knowledge, and makes no finding, as to whether the latter in fact has any such interest therein, vests him with title to the said proceeds and precludes

or excuses the said District Court from further exercise of its jurisdiction over said proceeds to the end of conserving the same, ascertaining their true owners and distributing them thereto.

5

Whether the appropriate Circuit Court of Appeals—on a timely appeal from a decree of said District Court upholding the affirmative of Questions 1, 2, 3 and 4 *supra,* and ordering without a trial of the merits delivery of said proceeds to the Alien Property Custodian as agent of and captor for the Federal Government—is (while said principal cause against said vessel still remains undisposed of) deprived of its jurisdiction and relieved of its duty to hear and decide said questions and reverse said decree because the Judge and Clerk of said District Court have physically delivered said cargo proceeds to the said Custodian in violation of a Federal law before the expiration of a stay (provided by said law) of ten days from the day of entry of said decree, and in violation of a rule of their own court before the expiration of a stay (provided by said rule) of ten days from the day of service of a copy of said decree with notice of filing on the opposite proctor, such service never having been effected either prior or subsequent to the lodging of such appeal, and no stay in addition to those so provided ever having been applied for by the said appellant.

D

Specifications of Error

Error is assigned to the decree and rulings of the Circuit Court of Appeals as follows:

1. In that they sanctioned the District Court's arbitrarily denying to petitioner and Italian Claimants the right

to defend as their own in court property there assailed and, without a trial, arbitrarily surrendering that property to another.

It is your petitioner's position that his petition, his answer to the Alien Property Custodian's petition and the answer thereto of the Royal Italian Government and Societa Anonima Cooperativa di Navigazione Garibaldi alleged a valid defense to Custodian's said petition (*Schuchardt* v. *Ship Angelique,* 19 How. 239, 241; *The J. E. Rumbell,* 148 U. S. 1, 15; *Ingersoll* v. *Coram,* 211 U. S. 335; *Walker* v. *Brown,* 165 U. S. 654; *Barnes* v. *Alexander,* 232 U. S. 117, 120, 121; Pomeroy's Equity Jurisprudence [5th ed., 1941], Vol. 4, sec. 1235, p. 696); and that it was an arbitrary denial of due process for the District Court to surrender the proceeds of the "Brennero's" cargo to the Custodian, deny petitioner and the other said parties their asserted right to defend in court their property as there assailed by the Custodian, and dismiss their pleadings and defense unheard, while the merits thereof and of the Custodian's assailing claim remained untried (Const., 5th Am'd't.)*

The basis for the District Court's decision, petitioner urged and urges, was on its face untenable. That basis was the proposition that the Custodian had, by virtue of his vesting order, "acquired absolute title to the fund" (R. 93a). The face of the record shows that cannot be true for at least six reasons:

First: The fund was a *res* in court where title was then in course of being judicially tried; as to which therefore, the Custodian possessed no right of capture by predetermining title in himself.

Second: The fund was a trust fund analogous to a fund held by a District Court in limitation of liability proceed-

* "No person shall be deprived of * * * property without due process of law; * * *."

ings, and being administered by that District Court as a court of equity, and no claimant was entitled to a decree of title thereto without his first *establishing* his right in proceedings wherein his adversaries had full and fair opportunity to be heard and to disprove it. (*McVeigh* v. *United States,* 11 Wall. 259, 267; *Windsor* v. *McVeigh,* 93 U. S. 274, 277; *Hovey* v. *Elliott,* 167 U. S. 409, 414; *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione,* 248 U. S. 9, 22; *Truax* v. *Corrigan,* 257 U. S. 312, 332.)

THIRD: The vesting order itself showed that the Custodian had made no predetermination of title in himself, as successor in interest to an enemy owner, and therefore could not exercise the power of capture nor assume the status of captor. (Trading with the Enemy Act, sec. 7[c], *supra,* 6n.; Executive Order No. 9095 [7 F. R. 1971] as amended by Executive Order No. 9193 [7 F. R. 5205], sec. 10[a]*; *Stoehr* v. *Wallace,* 255 U. S. 239, 244-245; *Hunter* v. *Central Union Trust Co.* [D.C. S.D. N.Y.], 17 F. 2d 174, 175, 178).

FOURTH: His petition showed on its face that he came into court not in the capacity of captor but in that of

---

* This reads:

"10. * * * (a) * * * For the purpose of this Executive Order any *determination* by the Alien Property Custodian that any property or interest of any foreign country or national thereof *is* the property or interest of a designated enemy country or national thereof shall be *final and conclusive as to the power* of the Alien Property Custodian *to exercise any* of the power or authority conferred upon me by section 5(b)† of the Trading with the Enemy Act, as amended." (Emphasis supplied.)

† Section 5(b) as pertinent, reads:

"(1) During the time of war or during any other period of national emergency declared by the President, * * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States * * *."

suitor; and called on the court *to exercise, not abandon to him,* its function of adjudicating title to the *res* (R. 49a-53a).

FIFTH: The vesting order, itself showed that his *utmost claim* to title, was not to title of the *res* itself but only to such "right, title and interest, if any," therein as might be possessed at the time of the vesting order by three named alien enemies; and so, until the *Court* had by trial determined that the exclusive right thereto *was* in them and none in your petitioner, it had no color of right for assuming *all* right to be in the Custodian as their successor in interest, and *none* in your petitioner. (*Isenberg* v. *Trent Trust Co.* [C.C.A. 9th Cir.], 26 F. 2d 609, 613, cert. den. 279 U. S. 862).

SIXTH: As proceeds of the cargo still aboard the "Brennero" when the latter was requisitioned, the fund in the District Court's registry shared the vessel's immunity to capture (Brief of Petitioner in *The Antoinetta,* No. 1172 here, October Term, 1945).

2. In that they pronounced the decree of the District Court denying petitioner the right to be heard in defense of his property and ordering its surrender to another, a "lawful court order."

The basis of this assignment is that since the decree of the District Court plainly violated the command of the Fifth Amendment that none shall be deprived of his property without due process of law,—which must include the right to defend it in Court when there assailed,—it could not have been a lawful order (*McVeigh* v. *United States, supra; Windsor* v. *McVeigh, supra; Hovey* v. *Elliott, supra; Watts, Watts & Co.* v. *Unione Austriaca di Navigazione, supra; Truax* v. *Corrigan, supra*).

3. In that they ruled that the Custodian's seizure "vested title to the oil in the Custodian" (R.).

It is petitioner's position that that ruling, like that of the District Court to the same effect, is without color of right because it was not in the power of the Custodian to capture a title in course of being adjudicated in court (cases last *supra*); because a capture of named enemies' "right, title and interest, if any," in a *res*, is not a capture of title to the *res* (*Isenberg* v. *Trent Trust Co., supra*, 613); and because that ruling is contradicted by the express terms of the vesting order itself and undertakes to force on the Custodian a title he himself had refused to assume (R. 54a).

4. In that they ruled that the decree directing payment of the fund to the Custodian was "an order which the court had the power to make."

It is petitioner's contention that the District Court had no judicial power whatever to enter a decree disposing of his property to another until after a trial of the merits; that "judicial power, as contradistinguished from the power of the laws, has no existence" (*Osborn* v. *United States Bank*, 9 Wheat. 738, 866); and that, in violating the command of the Fifth Amendment, the court was exceeding its judicial power quite as much as a court that surrenders a *res* in violation of a *pendente lite* stay imposed by statute (*The Rio Grande*, 23 Wall. 458, 463, 465), the only difference being that the latter stay is temporary, that of the Fifth Amendment perpetual.

5. In that they in effect ruled and decreed that a United States District Court holding a fund in its registry in trust for those beneficially entitled thereto may—without a finding either by Custodian or by Court of the existence of an enemy interest therein,—abdicate its judicial jurisdiction and avoid its judicial duty, by availing itself of the privilege accorded private persons under subsec-

tions (d) and (e) of Section 7 of the Trading with the Enemy Act and turning such trust fund over to the Custodian.

The basis of this argument is that the District Court did, in effect, what individuals might do under said provisions of said statute, viz., deliver property in their possession to the Custodian though he had not captured it, and thereby relieve themselves of liability to *enemy* owners if any such there be; that the Court of Appeals in its decree of affirmance, in effect, approved of what the District Court had thus done; and that, in so doing, the Court of Appeals erred for at least three reasons, viz.: (1) Because the District Court was not a person entitled to the benefit of subsections (d) and (e) of Section 7 of the Trading with the Enemy Act; (2) because its judicial duties forbade its availing itself of such benefit; and (3) because just as a person, while in course of being proceeded against in court by a citizen suitor for the recovery of such property or its value as his own, could not escape his asserted liability therefor by delivering it to the Custodian as enemy property, the District Court could not evade *its* duty of adjudication owed to the *citizen* suitor under the like circumstances.

6. In that they determined the removal of the fund from the registry of the District Court by its Judge and Clerk to have been with color of right.

The basis of this assignment is that, in addition to the court's violation of the Fifth Amendment in entering its decree, its Judge and Clerk violated the *pendente lite* stay imposed by R. S. secs. 1007 and 1012 (*supra*, 7n.) and the 28th Admiralty Rule of their own court (*supra*, 8n.). Those statutes automatically prohibited payment of the fund in execution of the decree until ten days, excluding Sundays, after its entry; and the rule, until ten

days from and after the day of service of a copy of the decree with notice of filing upon the opposite proctor. That law and that rule the Judge and Clerk made no pretense of obeying. Instead, they executed the order on the *third* day after its entry, Sunday excluded: It was entered on Thursday, January 20th, 1944 (R. 7a); they executed it on Monday, January 24th, 1944 (R. 7a). That rule, as well as those statutes, had the force of law (*Weil* v. *Neary*, 278 U. S. 160, 169-170). And it was and is petitioner's position that the Judge and Clerk here had no more color of right for violating that *pendente lite* stay so imposed by law than had the court for violating the same kind of a stay in *The Rio Grande, supra:* The removal of the *res* in violation of the stay in that case was pronounced "illegal" (463); it could have been no less so here.

7. In that they permitted the Custodian to urge the Circuit Court's want of power to act for want of the *res* he himself had wrongfully obtained and he or his principal wrongfully withheld.

The basis of this assignment is that the Circuit Court could not properly hear the *Custodian* complain of the absence of the *res* since it was he that wrongfully had removed it from the District Court and he or his principal that wrongfully withheld it. He and his principal were equally estopped from seeking advantage from its absence. To permit them to gain such advantage was to permit them to profit from their own wrong.

8. In that they erred insofar as they may be deemed to have ruled and decreed that the lower Courts were without jurisdiction to enter a decree against the United States—if it in the meantime may be presumed to have acquired possession of the trust fund,—adjudicating its

liability to pay the amount thereof to petitioner on the determination of his right, if any, in and to said trust fund.

The basis of this assignment is that the United States was a party to the litigation, had itself commenced it, was itself maintaining it, had itself induced the District Court to sell the cargo and deposit the proceeds in its registry, and by its Custodian was there claiming it in Court, and therefore, in respect to that litigation and those proceeds, had waived its sovereign immunity to suit and consented to the adjudication of its liability to the end that full justice should be determined and decreed by the Court in respect thereto (*The Siren*, 7 Wall. 152, 154, 159; *The Nuestra Señora de Regla*, 108 U. S. 92, 101, 102, 103; *The Thekla*, 266 U. S. 328, 340, 341).

9. In that they in effect sanctioned a breach of trust committed by the District Judge and his Clerk in paying away, contrary to law, a trust fund in their charge.

Petitioner urged and urges that in respect to the cargo proceeds the District Court sat as a court of conscience; that it held those proceeds in trust; that their surrender was a breach of that trust; and that it was the first duty of the Circuit Court to undo the wrong inflicted by the District Judge and his Clerk upon petitioner as one claiming to own the sole beneficial interest in the fund; that as to that fund the Circuit Court, like the District Court, sat as a court of equity and conscience; that their decrees ran *in personam*, as well as *in rem*, and were adequate to the correction of unconscionable wrong, at least where still before those Courts were the parties that were chargeable with that wrong; and that it is unconscionable that a wrong of the kind here practised should be permitted to endure.

10. In that they ruled and decreed in effect that the Circuit Court of Appeals was powerless to review and correct the diversion of the trust fund to the Custodian.

It was and is petitioner's contention that the Circuit Court of Appeals is not so powerless that it cannot correct injustice done in the District Court when that injustice is so great as entirely to dispossess the court of a trust fund it has had in its possession. That, if the Court be potent to correct the lesser injustice, viz., a partial depletion of a trust fund, some remnant of which still persists in the District Court's custody, it must be all the more possessed of power, in any enlightened system of justice, to correct the greater wrong involved in the complete dissipation, diversion and disappearance of such a fund. That its claim of impotence to correct the wrong is all the less sustainable here because it still had before it, as a party to the principal cause concerning the vessel *res*, as well as to the incidental cause concerning the proceeds of her cargo, the Custodian, who had received the trust fund with knowledge of the breach of law and trust involved, who, therefore, held it impressed with its original trust, and who, as such party, is and must be, whether he subsequently disposed of the trust fund or not, thoroughly amenable to the Court's jurisdiction to see justice done. That the Court also had before it as a party in like manner and like measure the Custodian's principal, the United States, whose liability to the extent it may be deemed to have received the trust fund is commensurate with that of the Custodian and for the like reasons. That, sitting as Courts of Equity in respect to the cargo proceeds, the lower courts' process was issuable *in personan* so that even though the *res* had gone, they were still able to compel the party or parties that had received it and that were still before them, to repay it; and that, too,

regardless of the fact that such parties may in the meantime have removed *it* beyond the Courts' jurisdiction.

11. In that they ruled and decreed in effect that petitioner's failure to move for a third stay *pendente lite* in addition to the first provided by R. S. secs. 1007 and 1012 (*supra,* 7n.) and the second provided by the District Court's 28th Admiralty Rule (*supra,* 8n.) destroyed those stays, legalized the previous unlawful disbursement of the fund, and destroyed the jurisdiction of the courts over the *res* and controversy.

It was and is petitioner's claim that already having the benefit of two perfectly good *pendente lite* stays imposed by law, to say nothing of the permanent stay provided by the Fifth Amendment, it was in no event incumbent upon him to seek another; at least unless and until steps were taken to dissolve the first by the return of the fund to the District Court so that that stay could resume the running of its course,—or to dissolve the second by service of a copy of the order with notice of filing. When and if those steps had been taken, petitioner would still have had seven days' time under the first stay, and ten under the second, in which to apply for a third. To apply for it before, would have been to seek what might never be needed:—What in fact never has been needed. For it is not denied that the fund never has been returned and, therefore, never has been subject to the first stay for more than three of the prescribed ten days; nor that a copy of the decree with notice of filing has never been served and, therefore, never has started the running of the last ten days of the second stay.

12. In that they failed to rule and decree that the District Court and Circuit Court of Appeals, while they still possessed plenary jurisdiction over the principal

cause, necessarily still possessed plenary jurisdiction over all its incidents, including the fund and the question of its beneficial ownership.

The basis of this assignment is the fact that the fund and the question of right thereto did not constitute the principal *res* and the principal cause before the District Court; that they were but incidents thereof; and that this case, therefore, even although it involved (as it does not) a lost *res*, is not subject to the same rule as would be applicable where the sole *res* has slipped from the Court's jurisdiction. The principal *res* here was *the vessel "Brennero"*; and the principal cause, the question of *its ownership*. The fund only *incidentally* came into court *with*, and *as a part of*, the vessel; and was so treated by the District Court (R. 92a), as well as by the Custodian, whose vesting order read (R. 53a):

> "In the case of the SS. Brennero the term 'vessel' includes also the proceeds of the cargo that was on board at the time the libel for forfeiture against the SS. Brennero was filed in the United States District Court for the District of New Jersey, which cargo has since been sold by order of said court."

The Circuit Court had no doubt that it had acquired jurisdiction over that principal *res* and that principal cause. But, if so, petitioner insisted below and insists here, it must have acquired jurisdiction at the same time over all its incidents, including the fund and the question of *its* ownership. For surrender of the incidental *res* to the Custodian had left the District Court in full possession of such jurisdiction as it had previously possessed over the principal *res* and cause; and, therefore, of jurisdiction to recall, or at least decree payment of the value of, the incidental *res* (*United States* v. *Ames*, 99 U. S. 35, 40-41,

42; *The Three Friends,* 166 U. S. 1, 68; *The I. F. Chapman* [C. C. A., 1st Cir.], 241 Fed. 836, 840). And, when the Circuit Court on appeal acquired the District Court's jurisdiction over the principal *res* and cause, it must also have acquired as an incident thereof that same court's jurisdiction to recall the incidental *res* or, at least, to decree the liability of any party that had received it to pay its value to petitioner if otherwise entitled thereto; and, if it did not, to enforce petitioner's claim against the principal *res* to the extent the former had any property therein (*Finley* v. *Lynn,* 6 Cranch 238, 252).

E

Reasons Relied on for the Allowance of the Writ

I. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision as follows:

It has, in its disposition of the five questions here presented (*supra,* 10-12), deprived, and sanctioned the District Court's depriving, petitioner of his property—while he was there engaged in defending the same against an adverse claim—without a hearing and in defiance of the applicable guaranties of due process.

It has, in its disposition of said questions, denied, and sanctioned the District Court's denying, petitioner the right of urging his claim of *beneficial title* to a fund held by the court in trust for its beneficial owners, and of urging in court—against a claim of captor's title there asserted by the United States to such "right, title and interest, if any," therein as was owned by certain named alien enemies,—the defense that such property, at the time of the alleged capture, was beneficially owned by him.

It has, in its disposition of said questions, denied petitioner, a citizen of the United States, the right of urging in court against said claim of captor's title there urged by the United States, the defense that there had never been such a capture, even of said alien enemies' interest, if any, in the *res,* because of the alleged captor's want of statutory and constitutional power to effect such a capture in any event, and because if he had such power, in any event, it was exercisable only after he had first found the existence in fact of an enemy interest in the *res,* and such he had not found.

It has, in its disposition of the fifth question, disclaimed all jurisdiction over and refused to hear petitioner's timely appeal from a decree of the District Court,—which without a trial dismissed his claim to the equitable ownership of a trust fund in its possession, and without a trial ordered its delivery to another in violation of the Fifth Amendment,—on the ground that surrender by the District Judge and Clerk of said trust fund to such other before appeal and in violation of stays provided by law and the rules of their own court, was a lawful execution of a lawful order and deprived both District and Circuit Courts of all further jurisdiction over the cause and over the trust *res.*

It has, in its disposition of the fifth question, though still exercising jurisdiction over the principal *res* and cause, to-wit, a vessel and the question of right thereto, yet has at the same time refused to exercise its purely incidental jurisdiction over the proceeds of her cargo and the question of right thereto on the ground that the unlawful delivery thereof pursuant to an unconstitutional decree precluded both District and Circuit Courts from any further exercise of that incidental jurisdiction.

II. The Circuit Court of Appeals' decision of the five federal questions here presented (*supra*, 10-12), conflicts with the applicable decisions of this Court, to-wit:

Its decision of the first and second, with *McVeigh* v. *United States*, 11 Wall. 259, *Windsor* v. *McVeigh*, 93 U. S. 274, 277, *Hovey* v. *Elliott*, 167 U. S. 409, 418, *Truax* v. *Corrigan*, 257 U. S. 312, 332, and cases to the same effect; and with *The Siren*, 7 Wall. 152, 154, 159, *The Nuestra Señora de Regla*, 108 U. S. 92, 101, 102, 103, *The Thekla*, 266 U. S. 328, 340, 341, and kindred cases.

Its decision of the third, with *Brown* v. *United States*, 8 Cranch 110, 126, and *Perry* v. *United States*, 294 U. S. 330, 352, 353, 354.

Its decision of the fourth, with *Stoehr* v. *Wallace*, 255 U. S. 239, 244-245; and with *Cohens* v. *Virginia*, 6 Wheat. 264, 404, and kindred cases.

Its decision of the fifth with *The Rio Grande*, 23 Wall. 458, 463, 465, and *The Nuestra Señora de Regla*, 108 U. S. 92, 101, 102, 103; with *Irrigation Company* v. *Gildersleeve*, 174 U. S. 603, 608, and *Weil* v. *Neary*, 278 U. S. 160, 169-170; with *United States* v. *Ames*, 99 U. S. 35, 40-41, and *The Three Friends*, 166 U. S. 1, 68; with *The Siren*, 7 Wall. 152, 154, 159, and *The Thekla*, 266 U. S. 328, 340, 341; and with *Massie* v. *Watts*, 6 Cranch 148, 158, 159, 160, *Oliver* v. *Piatt*, 3 How. 333, 401, *Osborn* v. *United States Bank*, 9 Wheat. 738, 838-839, 842-844, *Phelps* v. *McDonald*, 99 U. S. 298, 308, *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619, 620, *United States* v. *Dunn*, 268 U. S. 121, 132, *Hartford Accident Co.* v. *Southern Pacific*, 273 U. S. 207, 215, 216-218, and *Just* v. *Chambers*, 312 U. S. 383, 386.

III. The decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of

Appeals as follows viz.: Its decision of the fourth question is in conflict with that of the Ninth Circuit Court of Appeals (*Isenberg* v. *Trent Trust Co.,* 26 F. 2d 609, 613, cert. den. 279 U. S. 862) holding that the vesting of an alien enemy's "right, title and interest", if any, in a *res* in the custody of a court hearing litigation over the question of its ownership, leaves the court possessed, as before, of full jurisdiction to retain the *res* in its custody and determine on proofs the ownership thereof.

IV. The Circuit Court of Appeals, in disposing of the fourth question, has decided a federal question that has never been, but should be, decided by this Court, viz.: Whether an order by the Alien Property Custodian of the United States, purporting to vest himself with the "right, title and interest, if any," of a specified alien enemy in a *res* in litigation and in *custodia legis,* if effective at all, deprives the court, in which such litigation pends, of jurisdiction to retain such *res* in its custody and control and determine what right, title and interest, if any, such alien enemy, as well as others, in fact have therein, or, on the contrary, leaves such jurisdiction unimpaired, at least until those respective interests have been so determined.

V. The Circuit Court of Appeals in disposing of the second, fourth and fifth questions, has decided a federal question that has never been, but should be, decided by this Court, viz.: Whether a United States District Court sitting in admiralty and holding a remnant and surplus in its registry in trust for its owners and having been presented with a citizen's claim therefor as beneficially owned by him, may escape its judicial and trustee duties by delivering such fund to the Alien Property Custodian on its own initative under sub-sections (d) and (e) of section 7 of the Trading with the Enemy Act.

VI. The Circuit Court of Appeals, in disposing of the fifth question, has decided a federal question that has never been, but should be, decided by this Court, viz.: Whether the paying away by a United States District Judge and United States District Court Clerk of a trust fund in the registry of their Court to the Alien Property Custodian in violation of stays provided by Federal law and the rules of their own court,—before determination of the question of its ownership as between the Custodian, a citizen and the rest of the world, which question had been freely submitted to said Court by said Custodian and said citizen, and before appeal from a decree ordering such surrender,—destroys all further jurisdiction of the District Court and all appellate jurisdiction of the appropriate Circuit Court of Appeals over such trust fund; all their power to compel the Custodian to repay it at least while still a party before those courts; all their power to adjudicate the liability to petitioner of the United States and decree his right of recovery therefrom, at least to the extent any of said trust fund found its way into its possession; and all their power further to consider the question of the propriety of such decree and, if wrong, correct it.

VII. The Circuit Court of Appeals in disposing of the fifth question has decided a federal question that has never been, but should be, decided by this Court, viz.: Whether the stay of execution required by the Revised Statutes, sections 1007 and 1012 as amended (*supra*, 7n.), prohibiting *inter alia* in an appealable case payment by the officers of a United States District Court of a trust fund in its registry until a period of ten days, Sundays excluded, shall have elapsed after the entry of a decree directing such payment, does not, for jurisdictional pur-

poses, in case of earlier payment in violation of said law, continue such stay in full force and effect until the fund shall have been restored to the court's possession and shall have remained therein for such further time as, added to the time that may have elapsed between the entry of said decree and said payment, makes up said period of ten days, excluding Sundays.

VIII. The questions here presented relate to property rights of a citizen of the United States under the Constitution in and to a trust fund in the registry of a United States District Court; which rights though duly asserted have been denied all consideration by the lower courts. They relate as well to the fiduciary obligations of federal judicial officers in respect to the conservation of that trust fund, which in plain violation of federal law and to the great detriment and injury of said citizen and suitor in that District Court has been by Judge and Clerk thereof paid away to another who had failed to establish, or even to offer any proof of, his right thereto. The questions are, therefore, of the greatest public importance.

Wherefore, your petitioner prays that a writ of certiorari be issued by this Honorable Court in the above-entitled cause to the Circuit Court of Appeals for the Third Circuit, requiring the latter to certify the said cause to this Honorable Court to the end that the questions involved therein may here receive due attention and consideration, and that the decree entered therein by the said Circuit Court may be reversed accordingly.

HOMER L. LOOMIS,
Petitioner.

State of New York, }
County of New York, } ss.:

HOMER L. LOOMIS, being duly sworn, deposes and says that he is a citizen of the United States, a resident of the State and City of New York, a member of the bar of this Honorable Court and each of the lower courts, and the petitioner above-named; that he has read the foregoing petition and is familiar with its contents and that the same is true to the best of his knowledge, information and belief. And deponent further certifies that he is of the opinion that it sets forth a proper case for the granting of the writ of certiorari prayed for; and further certifies that it is not filed for purpose of delay.

HOMER L. LOOMIS.

Sworn and subscribed to before me }
this 10th day of May, 1946. }

GEORGE SALTOUN
Notary Public, New York County
N. Y. Co. Clk's No. 15, Reg. No. 324-S-7
Bronx Co. Clk's No. 48, Reg. No. 202-S-7
Kings Co. Clk's No. 62, Reg. No. 398-S-7
Commission Expires March 30, 1947